Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

C. PEYTON BARTON, JR.,

Petitioner,

v.

DISTRICT OF COLUMBIA,

Respondent.

Petition for a Writ of Certiorari to the
The Court of Appeals for the District of Columbia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Petitioner has rights that are legally enforceable, offensively or defensively, under well-settled legal principles, where the Congress made a grant of $3 Million to the District of Columbia explicitly conditioned on the District's negotiating and signing a 30-year lease with Petitioner, or whether the District can accept the $3 Million grant, while refusing to comply with such statutory conditions?

II. Whether the Court of Appeals' decision allows a violation of the takings clause of the Fifth Amendment?

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 03-_____

C. PEYTON BARTON, JR.,

Petitioner,

v.

DISTRICT OF COLUMBIA,

Respondent.

Petition For Writ Of *Certiorari* To The
District of Columbia Court of Appeals

PETITION FOR WRIT OF *CERTIORARI*

Petitioner, C. Peyton Barton, respectfully petitions for a writ of *certiorari* to review the judgment of the District of Columbia Court of Appeals.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 817 A.2d 834; App. A at 1a-12a.[1]

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[1] References to the Appendix to this Petition are the page

The decision of the trial court in the Superior Court of the District of Columbia is unreported. App. B at 13a-28a.

JURISDICTION

The District of Columbia Court of Appeals denied Petitioner's Petition for Rehearing or Rehearing *En Banc* on August 5, 2003. App. C at 29a-30a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (2003).

RELEVANT CONSTITUTIONAL PROVISIONS

Article I, § 8 of the United States Constitution provides in part: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."

The Fifth Amendment of the United States Constitution provides in part that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTE INVOLVED

On October 21, 1998, the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (the "1999 Appropriations Act"), Pub. L. No. 105-277, 1998

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number followed by "a."

HR 4328, 112 Stat. 2681, became law. The applicable section of the 1999 Appropriations Act at issue is set forth below:

> FEDERAL PAYMENT FOR WATERFRONT IMPROVEMENTS
>
> For a Federal payment to the District of Columbia Department of Housing and Community Development for a study in consultation with the United States Army Corps of Engineers of necessary improvements to the Southwest Waterfront in the District of Columbia (including upgrading marina dock pilings and paving and restoring walkways in the marina and fish market areas) for the portions of Federal property in the Southwest quadrant of the District of Columbia within Lots 847 and 848, a portion of Lot 846, and the unassessed Federal real property adjacent to Lot 848 in Square 473, and for carrying out the improvements recommended by the study, $3,000,000: Provided, ***That no portion of such funds shall be available to the District of Columbia unless the District of Columbia executes a 30-year lease with the existing lessees, or with their successors in interest, of such portions of property not later than 30 days after the existing lessees or their successors in interest have submitted to the District of Columbia acceptable plans for improvements and private financing;***

> Provided further, That the District of Columbia shall report its progress on this project on a quarterly basis to the Committees on Appropriations of the House of Representatives and the Senate.
> . . .

112 Stat. 2681 at 124-125. (Emphasis added.)

STATEMENT OF THE CASE

1. Legislative History. The area known as "the Southwest Waterfront" in the District of Columbia borders on the shore of the Potomac River and the Washington Channel, and extends from the 14th Street Bridge eastward and down river. The Committee on Appropriations of the United States House of Representatives issued a report finding that the Municipal Fish Wharf and the Washington Marina on the Southwest Waterfront were in such particularly run down and unsightly condition that congressional action was needed. *See* H.R. REP. No. 105-670, 105th Cong., 2d Sess., at 22-23 (1998). App. at 2a-3a.

The Municipal Fish Wharf consists of several lots of property that front on the Washington Channel. There are improvements on the property consisting of wharves, piers, sidewalks, parking areas, Petitioner's Fish Market and another small one-story building. The Municipal Fish Wharf is bordered to the west by the Washington Marina and to the east by a seafood restaurant. *See* H.R. REP. No. 105-670, 105th Cong., 2d Sess., at 22-23 (1998).

Congress concluded that to renovate the Municipal Fish Wharf to an acceptable standard, the several concessionaires operating outdoor fish and seafood

markets would be provided with 30-year leases in order to qualify for credit to raise private funds to invest in their physical business facilities. Congress approved a $3 million grant to the District of Columbia government for a study of this project by the United States Corp of Engineers in order to identify where to renovate and improve the infrastructure of the Municipal Fish Wharf. *See* H.R. REP. No. 105-670, 105th Cong., 2d Sess., at 22-23 (1998). App. at 4a.

The District of Columbia manages and controls both properties, even though they are owned by the United States government. Under the congressionally enacted statute, the District of Columbia government managed and controlled the agreements entitling the concession businesses to operate under exclusive commercial arrangements. To accomplish the congressional objective of improving the waterfront, Congress created a three-party partnership. Congress appropriated the $3 million and required that if the District of Columbia took the money, the District of Columbia must provide 30-year leases to the several concessionaires then operating on the waterfront. *See* H.R. REP. No. 105-670, 105th Cong., 2d Sess., at 22-23 (1998).

The Congress decided that only if the District of Columbia government gave the several concessionaires 30-year agreements would these several businesses have the incentive to obtain the necessary financing from private sources to make the type of investments in their privately owned business facilities at the Municipal Fish Wharf. *See* H.R. REP. No. 105-670, 105th Cong., 2d Sess., at 22-23 (1998).

Congress used a "carrot-and-stick" funding provision, conditioning a $3 million grant to the District of Columbia on the District signing 30-year leases with the

concessionaires. The 1999 Appropriations Act provides: "That no portion of such funds shall be available to the District of Columbia unless the District of Columbia executes a 30-year lease with the existing lessees, or with their successors in interest, of such portions of property not later than 30 days after the existing lessees or their successors in interest have submitted to the District of Columbia acceptable plans for improvements and private financing." The statute and the legislative history make clear Congress intended to improve the Southwest Waterfront by providing leases to the concessionaires doing business at the Municipal Fish Wharf so they would have incentives to obtain private capital to improve their business in accordance with the intent of Congress and to end the dilapidated conditions which Congress found so distasteful. The 30-year leases would also enable the concessionaires to obtain financing for improvements in their facilities. *See* H.R. REP. No. 105-670, 105th Cong., 2d Sess., at 22-23 (1998).

2. Factual Background. Petitioner Barton is a small businessman who owns and operates the Maine Avenue Seafood, Inc. ("Maine Avenue Seafood") in the District's Southwest Waterfront at the historic Fish Market and Washington Marina ("Fish Market"). Maine Avenue Seafood is housed in a building owned by the federal government and managed by the District. App. at 15a.

Mr. Barton began his tenancy in 1996 when he acquired the lease from Maurice Morgan, who had previously operated Morgan Seafood at that location. App. at 15a. The District recognized the assignment of the lease from Mr. Morgan to Mr. Barton. App. at 15a.

Throughout the spring and summer of 1999, Mr. Barton was involved in negotiating a long-term lease of his premises at the Municipal Fish Wharf with Messrs. Jones and Johnson, both of whom were employed by the

District of Columbia Government. App. at 23a. In reliance on the 1999 Appropriations Act, Petitioner Barton retained an architect to prepare plans for improvement of the waterfront premises which he occupied and began to make improvements in his building. Pursuant to such negotiations, drafts of leases were exchanged by the parties. Mr. Barton submitted his architect's plans to the District of Columbia. Mr. Barton was in "continuing communication" with Jones and Johnson regarding the extension of his lease. App. at 23a-24a; 31a-34a.

During the negotiation process, Mr. Jones inquired whether Mr. Barton would be interested in continuing his business from a floating barge moored at the Municipal Fish Wharf. App. at 24a. Mr. Barton soon learned that the current occupants of the barges were unwilling to relinquish their possession of the sites where the barges were moored. App. at 24a. Accordingly, Mr. Barton concluded that transitioning his business to a floating barge would only lead to litigation with the current lessees, who had a statutory right to a 30-year lease pursuant to the 1999 Appropriations Act. Mr. Barton alleged that Mr. Jones' proposal regarding the floating barge was designed to elicit objection from Petitioner so that the District would then have reason to stop negotiations regarding his lease. App. at 24a, n.9; 31a-34a.

Shortly after Mr. Barton advised the District that the floating barge proposal was unworkable because this space was already encumbered, Mr. Jones accused Mr. Barton of not negotiating in good faith because he refused to relocate to the barge to be moored at a location. App. at 24a. The District never offered Mr. Barton a 30-year lease at his current property. Mr. Jones then terminated negotiations with Mr. Barton. App. at 24a.

On September 3, 1999, Mr. Johnson, who is African-American, came to Mr. Barton 's office and told Mr. Barton, who is Caucasian, "White trash, you are out of here." App. at 24a.

On September 17, 1999, two weeks later, the District served Mr. Barton with a Notice to Vacate. The Notice informed Mr. Barton that his tenancy was being terminated and that he must vacate the premises on or before November 1, 1999. App. at 15a. The reason proffered by the District for the eviction was that "the current use of the property is inconsistent with improvement plans for the premises" and the District desired to use the property in a manner "other than its current use." App. at 15a.

Contrary to the congressional mandate, the District accepted the $3 million from the federal government, negotiated leases with the other businesses leasing property at the Southwest waterfront, but refused to negotiate and sign a 30-year lease with Mr. Barton.

3. Subsequent Change in the Law. Effective November 29, 1999, ***after*** the District served Petitioner with the Notice to Vacate, and after the District filed suit for possession, Congress amended the 1999 Appropriations Act for the District by changing "existing lessees" to "existing lessees of the Marina." District of Columbia Appropriations Act, 2000, Pub. L. No. 106-113, § 164(b)(1), 113 Stat. 1529 (1999) (the "2000 Appropriations Act"). The effect of this change was to remove the statutory requirement that the District negotiate 30-year leases with Mr. Barton or other lessees of the Municipal Fish Wharf. The amendment in the 2000 Appropriations Act was to "take effect ***as if*** included in" the 1999 Appropriations Act. *Id.* § 164(b)(2) (emphasis added).

4. Proceedings Below.

A. District of Columbia Superior Court. When Mr. Barton did not move out in response to the September 17, 1999 Notice to Vacate, the District brought an action for possession in the Landlord and Tenant Branch of the Superior Court. The eviction action was brought on November 23, 1999, ***prior*** to the passage of the 2000 Appropriations Act. On December 15, 1999, Mr. Barton answered, counterclaimed and filed a jury demand. The matter was certified to the civil division for trial. App. at 13a.

Mr. Barton sought to include numerous defenses against the eviction action. Mr. Barton asserted that the District was obligated to negotiate and give him a long-term lease. Since the District failed to do so, the Notice to Vacate was contrary to law and therefore void.[2] App. at 15a.

The District moved for summary judgment, arguing that Mr. Barton's defenses were beyond the scope of those allowed by the Landlord and Tenant Rules. The Superior Court granted the District's motion for summary judgment. Putting aside the issue of whether Mr. Barton's statutory entitlement claim was precluded

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[2] Mr. Barton also asserted the eviction proceeding was motivated by racial animus as reflected in Mr. Johnson's "white trash" remark, in violation of his constitutional rights to due process and equal protection. Mr. Barton raised additional legal claims, none of which are germane to this Petition.

by the rules, the trial court rejected it on the merits, holding that there is no indication that Congress intended the statute to provide Mr. Barton with any enforceable rights whatsoever, such as a defense to a possessory action. App. at 19a. The trial court stated that: "the District retains its authority to evict the defendants even if such action may jeopardize the federal payment." App. at 19a.

Mr. Barton timely noted an appeal to the District of Columbia Court of Appeals. The eviction was stayed pending the outcome of the appeal.

B. District of Columbia Court of Appeals. Mr. Barton's main contention is that the trial court erred in ruling that the 1999 Appropriations Act did not grant him rights to a 30-year lease to the land where Maine Avenue Seafood was located, rights which he could enforce in court. The Court of Appeals stated: "Although that Act expressed a desire for the District to enter into long-term leases with existing fish market lessees, we agree with the trial court that it does not grant the lessees any rights that they can enforce in a court of law." App. at 6a.

In deciding that Mr. Barton did not have a private right of action, the Court of Appeals relied primarily on federal law in considering whether a statute creates a private right of action, either expressly or by implication. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16, (1979) ("what must ultimately be determined is whether Congress intended to create the private remedy asserted ....") App. at 7a. The Court of Appeals concluded that: "Contrary to Barton's assertions, neither the language nor the legislative history of the 1999 Appropriations Act gives any indication that Congress intended to create a private right of enforcement for the lessees." App. at 7a.

The Court below held that: "the plain language of

the 1999 Appropriations Act shows that no enforceable rights are being bestowed on the existing lessees." App. at 7a. The statute imposes no affirmative duty on the District to execute any leases; rather, it makes the availability of appropriated funds contingent upon such action, which the District is free to take or not as it sees fit. App. at 7a.

The Court of Appeals also concluded that Mr. Barton's claims could not proceed because the 2000 Appropriations Act retroactively amended the 1999 Appropriations Act by changing the term "existing lessees" to "existing lessees of the Marina." The effect of this amendment was to remove the condition that the District negotiate long-term leases with those businesses operating in the fish market building. Because Mr. Barton leases space in the fish market building and not in the marina, the 2000 Appropriations Act repealed the requirement imposed on the District of Columbia in the 1999 Appropriations Act that the District negotiate a 30-year lease with Mr. Barton.

The District of Columbia Court of Appeals remanded the matter "to the trial court for consideration of Mr. Barton's claims that the District's efforts to evict him were motivated by racial animus." App. at 10a. The Court of Appeals subsequently stayed the issuance of its mandate until November 17, 2003. Mr. Barton continues to do business as Maine Avenue Seafood.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for review because the petition raises important federal questions of continuing national importance and because the decision below is contrary to well-settled principles of constitutional law and statutory construction. Further,

the Court should grant review in order to prevent states and the District of Columbia from accepting federal money without complying with the express statutory conditions accompanying the appropriation of such funds.

Congress frequently conditions appropriation of funds to the District of Columbia and to the states to achieve its legislative purposes. Indeed, that is what Congress did in this instance. Congress imposed certain limitations on the release of the federal funds pursuant to the 1999 Appropriations Act, which provided: "no portion of such funds shall be available to the District of Columbia unless the District of Columbia executes a 30-year lease with the existing lessees." Congress thereby granted existing lessees a right to a 30-year lease under the 1999 Appropriations Act.

In the absence of a private right of action granting Mr. Barton the right to enforce this provision of the 1999 Appropriations Act, the District of Columbia will have no incentive to comply with congressional mandates in the future. If Mr. Barton is not allowed to rely on the rights granted to him under the 1999 Appropriations Act, then District of Columbia officials will be allowed to nullify an Act of Congress and thwart congressional intent.

The District of Columbia Court of Appeals failed to follow the clear precedent of this Court's rulings in *Cort v. Ash*, 422 U.S. 66, 78 (1975) and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28-29, (1981) when it concluded Petitioner Barton did not have enforceable rights under the Appropriations Act of 1999.

The Court of Appeals conceded that the Act "expressed a [congressional] desire for the District to enter into long-term leases with the existing fish market lessees." App. at 6a. But Congress certainly cannot be presumed to have enacted unenforceable legislation. The rule of law and more than two centuries of legal precedent

require that the laws furnish a "remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1802).

The District of Columbia Court of Appeals also erred in ruling that the District could deprive Mr. Barton of his property rights without just compensation. The lower courts' interpretation of the 1999 and 2000 Appropriations Acts violate Mr. Barton's rights under the takings clause of the Fifth Amendment of the Constitution. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987); *Williamson County Regional Planning Com'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). This issue arises frequently, whenever Congress, or a state legislature, rescinds a previously granted property right in amending the law. Review should be granted because of the importance of this issue and the District's flagrant violation of well-settled constitutional principles.

ARGUMENT

I. PETITIONER HAS ENFORCEABLE RIGHTS UNDER THE 1999 APPROPRIATIONS ACT

The language of the statute and the legislative history are clear expressions of congressional intent. The District of Columbia accepted $3 million which carried the unambiguous and binding requirement that D.C. execute 30-year leases with the existing lessees, such as Mr. Barton, and that the District do so "not later than 30 days after the existing lessees or their successors in interest have submitted to the District of Columbia acceptable plans for improvements and private financing." Mr. Barton submitted a Declaration in Opposition to the District's Motion for Summary Judgment demonstrating

that he fulfilled the condition precedent for the execution of a 30-year lease with the District. App. at 14a; 31a-34a.

Notwithstanding the clear expression of congressional intent, the trial court and the D.C. Court of Appeals held that Mr. Barton did not have any enforceable rights under the 1999 Appropriations Act. The Court of Appeals erred for two distinct, but related, reasons.

A. PETITIONER HAS A PRIVATE RIGHT OF ACTION UNDER THE 1999 APPROPRIATIONS ACT

The District of Columbia Court of Appeals failed to follow the clear precedent of this Court's rulings in *Cort v. Ash*, *supra*, and *Pennhurst State School and Hospital*, *supra*, in denying Petitioner Barton a private right of action arising out of the District of Columbia's wilful violation of an act passed under the spending clause. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 65-66, 72-73 (1992) (citation omitted); *Alexander v. Sandoval*, 532 U.S. 275, 279-280 287 (2001).

When determining whether an implied cause of action exists under a statute, the Court of Appeals was required to consider four factors: (1) whether the plaintiff is a member of the class for whose benefit the statute was enacted; (2) whether there is any indication of legislative intent to create or deny such a remedy; (3) whether an implied remedy is consistent with the underlying purposes of the statutory scheme; and (4) whether the cause of action is one traditionally relegated to the states so that it would be inappropriate to imply a federal remedy. *Cort v. Ash*, 422 U.S. at 78; *see also Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979). Each of the four *Cort* factors favors finding an implied cause of action in this case.

First, Mr. Barton is a member of the class for whose benefit the statute was enacted because he was one of the existing lessees. The language of the statute and the legislative history make clear Congress's intent was to benefit the concessionaires operating at the Washington Fish Wharf by providing them with financial incentives to invest in improvements of their facilities for the benefit of all concerned, and to provide them with financial stability so they could qualify for private financing of those improvements.

The second *Cort* factor, legislative intent, also favors Petitioner. Congress intended to create a remedy to ensure that Petitioner would be provided a 30-year lease after the District of Columbia's receipt of $3 million in federal funds. The District of Columbia accepted funds from the federal government and is now required to provide Mr. Barton with a 30-year lease.

Congressional intent is the most important element in the analysis of cases such as these. *See Thompson v. Thompson,* 484 U.S. 174, 179 (1988). Congress's intent to grant the concessionaires a private right of action to enforce a claim to a 30-year lease is demonstrated two ways.[3]

First, the legislative history of the 1999 Appropriations Act indicates that Congress intended existing lessees to have a cause of action to enforce its requirement that 30-year leases be provided to the existing lessees. The House Report states:

Several factors have combined to leave this portion of the

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[3] The Court of Appeals conceded that the Act "expressed a [congressional] desire for the District to enter into long-term leases with the existing fish market lessees." App. at 6a.

Southwest Waterfront in a dilapidated condition. In the case of the Washington Marina, built during the Franklin Roosevelt Administration, its month-to-month lease status of over 40 years has made it impossible for the lessee to obtain financing for maintenance and upgrades that are long overdue.

* * *

> The city is attempting to develop a long-term redevelopment plan for the Southwest Waterfront, to make it the showplace that it ought to be-along a beautiful river, and in sight of the Washington Monument and the Tidal Basin. However, in pursuing these plans, the city has continued the short-term, month-to-month lease policy that makes beautification and improvements of the Fish Market and the Marina by its lessees nearly impossible to finance and to accomplish. This situation further delays effective development and improvements, and precipitates the lessees' untenable business position, promoting an unacceptable further decay of the Southwest Waterfront.

H.R. REP. 105-670, August 3, 1998 at 22-23.

Congress intended that a good-faith partnership between the federal government, the city, and the lessees be created to help renew the Southwest Waterfront. Although Congress did not expressly grant a cause of action, the language above clearly suggests an intent on the part of Congress for courts to recognize private suits by the existing lessees as one of the "good-faith" partners.

Legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the states and the District of Columbia agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the "contract." *Pennhurst State School and Hospital*, 451 U.S. at 17.

Here, the legislative history reveals that Congress intended to create a good faith three-way partnership. The federal government provided consideration of $3 million to the District in exchange for the District agreeing to negotiate 30-year leases with the concessionaires already doing business at the Washington Fish Wharf. The District accepted $3 million, but refused to negotiate and execute a lease with Mr. Barton.

In addition to the statutory language and the legislative history discussed above, Congress also demonstrated its intent to allow Mr. Barton a private right of action because Congress explicitly barred a private right of action in two other sections of the 1999 Appropriations Act. Where Congress intended to bar a private right of action in the 1999 Appropriations Act, Congress clearly states this intent. Since Congress did ***not*** specifically address the issue of whether the existing lessees could bring a private action in the "Federal Payment for Waterfront Improvements" section of the 1999 Appropriations Act, the absence of any language barring a private right of action for this section of the 1999 Appropriations Act supports the conclusion that Congress intended such a private right of action.

Congress specifically excluded private rights of action in the "Department of Justice General Administration Salaries and Expenses" section of the

1999 Appropriations Act. This portion of the 1991 Appropriations Act making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1999, and for other purposes, specifically provides that "any transfer under the preceding proviso **shall not create or confer any private right of action in any person** against the United States, and shall be treated as a reprogramming under section 605 of this Act." 112 Stat. 2681 at 136-139. (Emphasis added.)

The second section of the 1999 Appropriations Act providing that there is no private right of action concerns spending for the Olympic Committee. This provision states:

> GENERAL CORPORATE POWERS.--Section 220505(b)(9) is amended by striking "sued; and" and inserting "sued, except that any civil action brought in a State court against the corporation and solely relating to the corporation's responsibilities under this Act shall be removed, at the request of the corporation, to the district court of the United States in the district in which the action was brought, and such district court shall have original jurisdiction over the action without regard to the amount in controversy or citizenship of the parties involved, and **except that neither this paragraph nor any other provision of this chapter shall create a private right of action under this chapter;**"

Pub.L. 105-277, Div. C, Title I, § 142(f), Oct. 21, 1998, 112 Stat. 2681-604. (Emphasis added.)

When Congress wished to exclude a private right of action in the 1999 Appropriations Act, Congress left no doubt as to its intentions. The congressional decision not to exclude a private right of action in the "Federal Payment for Waterfront Improvements" section of the 1999 Appropriations Act, when considered in context, is powerful evidence that Congress intended that Mr. Barton have a private right of action.

The third *Cort* factor also favors Mr. Barton because the underlying purpose of the statutory scheme was to provide existing lessees with long-term leases so they could obtain funding to beautify the District of Columbia waterfront. The implied remedy, providing Petitioner with a 30-year lease, is fully consistent with the statutory scheme.[4] Indeed, in the absence of a private right of action, the concessionaires are at the mercy of the whims of District of Columbia officials.

The fourth *Cort* factor also favors Mr. Barton, as the cause of action is **not** one traditionally relegated to the states. The cause of action arises under a federal statute passed to improve land in the nation's capital owned by the federal government. Thus it is appropriate to imply a federal remedy, that is, provide Mr. Barton with a lease on federal lands. Further, under the

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[4] The question of what remedies are available to redress a violation of the 1999 Appropriations Act can be easily determined. The 1999 Appropriations Act is an economic program and contractual damages encompass foreseeable economic damages. *See* 3 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS §§ 12.14, 12.17 (1990); *see also Harsch v. Eisenberg*, 956 F.2d 651 (7th Cir.), *cert. denied*, 506 U.S. 818, 113 S.Ct. 61, 121 L.Ed.2d 29 (1992). Petitioner should be put in "as good a position as that party would have been in had ... there been no breach." *See* Farnsworth, *supra*, § 12.1.

circumstances present here, the District of Columbia is certainly not going to enforce restrictions or conditions on the District's expenditures of federal funds. If Mr. Barton does not have the right to enforce the restrictions or conditions on the use of federal funds, then there will be no way to ensure that the acknowledged "desire" of Congress is actually followed.

Thus, Petitioner has a private right of action against the District of Columbia because Congress so intended. Congress clearly made the District of Columbia's receipt of the monies contingent on negotiating and signing 30-year leases with the concessionaires of the Washington Fish Marina. Traditionally, courts presume that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Franklin v. Gwinnett County Public Schools*, 503 U.S. at 66 (citation omitted). "[A]bsent clear direction to the contrary by Congress, the federal courts have the power to award any ***appropriate*** relief in a cognizable cause of action brought pursuant to a federal statute." *Id.* at 70-71 (emphasis added). Accordingly, the Court should grant the Petition to correct the error of the District of Columbia Court of Appeals and hold that Mr. Barton has a private right of action under the Appropriations Act of 1999.[5]

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[5] Petitioner also has enforceable rights under 42 U.S.C. §1983. *Blessing v. Freestone*, 520 U.S. 329 (1997) (violations of Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-669b.) Congress intended "that the provision in question benefit the plaintiff" because the relevant provision is "couched in mandatory rather than precatory terms." *Blessing*, 520 U.S. at 340-341 (citation omitted). The second part of the *Blessing* analysis supports Petitioner because the right to a 30-year lease is "not so 'vague and amorphous' that its enforcement

B. PETITIONER BARTON'S PRIVATE RIGHT OF ACTION MEETS THE REQUIREMENTS OF THE COURT'S SPENDING CLAUSE JURISPRUDENCE

In *Pennhurst State School*, the Court held: "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* at 17. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

This Court insists that fund recipients have clear advance notice of any expansion of the implied private rights of action previously recognized under Spending Clause legislation. *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) is particularly instructive.

In *Gebser*, the Court applied the principles of *Pennhurst State School and Hospital* construing Spending Clause legislation. The Court found that "conditioning an offer of federal funding on a promise by

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would not strain judicial competence." The final part of the *Blessing* test also favors Petitioner because the mandatory language of the 1999 Appropriations Act provides: "That no portion of such funds shall be available. . .. " This language "unambiguously impose[s] a binding obligation."

the recipient . . . in what amounts essentially to a contract between the Government and the recipient of funds." 524 U.S. at 286. When Congress attaches conditions to the award of federal funds under its spending power, U. S. Const., Art. I, § 8, cl. 1, this Court should examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition. The Court noted: "Our central concern in that regard is with ensuring that 'the receiving entity of federal funds [has] notice that it will be liable for a monetary award.'" *Id.* at 287 (citations omitted).

Because of those principles, the Court held that neither a *respondeat superior* theory nor a constructive notice theory could be used to impose liability on a fund recipient. The remedies available are constrained by the limits of *Pennhurst State School and Hospital* and by the requirement that fund recipients be subjected to only those conditions--including liability--of which they had adequate notice. *See* 524 U.S. at 284 ("We made no effort in *Franklin* to delimit the circumstances in which a damages remedy should lie."); *id.* at 287 ("Title IX's contractual nature has implications for our construction of the scope of available remedies.").

Legislation enacted pursuant to Congress's power under the Spending Clause permits "private damages actions . . . only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue." *Id.* at 640. There can be no knowing acceptance of legislative conditions of which the recipient is not made aware. *Id.*

Mr. Barton's claims meet the standards articulated by the Court in *Pennhurst State School and Hospital*, and *Gebser*. Congress has stated all conditions on the District of Columbia's receipt of federal funds "unambiguously" so that they are "knowingly[] cognizant of the consequences

of their participation." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State School and Hospital*, 451 U.S. at 17). There is a "contract" between the federal government and the District of Columbia which gave notice that the acceptance of $3 million in federal money is conditioned on the District's negotiating and awarding Mr. Barton a 30-year lease. The District of Columbia refused to comply with that provision and has taken money from the federal government without providing the 30-year lease as required by law.

Ordinary principles of contract law alerted the District of Columbia that it was exposing itself to the risk of damages to Mr. Barton as he was a party and intended beneficiary of the contract between the Congress and the District. The consequence of a legally binding promise is that the law makes the promisor pay damages in the event of the breach occurring when the District delivered the Notice to Vacate to Mr. Barton.

Congress intended "that the provision in question benefit the plaintiff;" that the right claimed is "not so 'vague and amorphous' that its enforcement would strain judicial competence;" and that the statute "unambiguously impose[s] a binding obligation," that is mandatory rather than precatory. *Blessing v. Freestone*, 520 U.S. at 340-41 (citations omitted).

The detailed nature of the requirements imposed on the District, including the length of the lease, evidences Congress' intent that the existing lessees be treated in a particular manner to ensure that they would obtain private financing in order to make necessary improvements to the Southwest Waterfront in the District of Columbia. *See id.* at 343. That limitation on the expenditure of federal monies ensures that the existing lessees would have the necessary incentives to make investments in improving the waterfront and be

able to obtain funding to do so. Moreover, the statutory scheme and legislative history of the 1999 Appropriations Act provides further evidence of Congress' intent to create for the existing lessees a private right to negotiate the lease and retain possession of the existing leased property.

Accordingly, the Court should find that Mr. Barton's private right of action satisfies the requirements of the Court's spending clause jurisprudence.

C. EVEN IF THERE IS NO PRIVATE RIGHT OF ACTION, PETITIONER STILL HAS ENFORCEABLE RIGHTS UNDER THE 1999 APPROPRIATIONS ACT

Even if this Court concludes the Mr. Barton does not have a private right of action under *Cort v. Ash* and its progeny, this Court should rule that Mr. Barton has enforceable rights under the 1999 Appropriations Act which he may assert as a defense to the District's attempt to evict him. Certainly Congress cannot be presumed to have enacted unenforceable legislation. As Justice John Marshall noted: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. at 163.

This Court has often held that even though a private remedy for monetary damages may not be available under a statute, this does not limit the defensive use of the statute to, for example, preclude enforcement of an investment advisers' contract. *E.g., Transamerica Mortgage Advisors*, 444 U.S. at 18 (interpreting the Investment Advisors Act of 1940).

Thus, even if there is no private right of action

under the Appropriations Act, Mr. Barton assert as a defense in an action for eviction that the District violated his rights under the Appropriations Act. The Court should grant the petition for review because the determination of the District of Columbia Court of Appeals that the "desire" of Congress may be ignored, *see* App at 6a, is contrary to the rule of law and two centuries of jurisprudence since *Marbury v. Madison*.

II. THE DISTRICT OF COLUMBIA APPROPRIATIONS ACT OF 1999 GRANTS PETITIONER A PROPERTY RIGHT WHICH CANNOT BE RESCINDED WITHOUT JUST COMPENSATION

On September 17, 1999, the District of Columbia gave Mr. Barton Notice to Vacate announcing that the District has abrogated its obligations under the Appropriations Act of 1999. The District of Columbia was acting in bad faith because Mr. Barton had done all that he was required to do to perfect his right to a 30-year lease. Mr. Barton therefore had an unconditional right to a 30-year lease as of September 17, 1999, when the District disclaimed any such right and issued the Notice to Vacate. Therefore, on September 17, 1999, Mr. Barton had a claim and a "chose in action" against the District arising under the 1999 Appropriations Act because the District had issued its formal decision denying Mr. Barton his right to a 30-year lease.

The Court of Appeals' analysis relies heavily on the fact that Congress amended this proviso in its 2000 Appropriations Act for the District by changing "existing lessees" to "existing lessees of the Marina." District of Columbia Appropriations Act, 2000, § 164(b)(1). The amendment was to "take effect as if included in" the 1999 Appropriations Act, § 164(b)(2), and was intended to

divest Mr. Barton of the statutory right to a lease granted him by the 1999 Appropriations Act.

However, it is well settled that a "chose in action" is a constitutionally recognized property interest. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). When the 2000 Appropriations Act became law in November, 1999, Mr. Barton already had vested a constitutionally recognized property interest because he had a cause of action against the District for violation of the rights granted to him under the 1999 Appropriations Act.

"The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Com'n, supra*, 473 U.S. at 194; *See United States v. Winstar Corp.*, 518 U.S. 839 (1996) (Financial institutions are entitled to damages under the Contract Clause resulting from change in legislation). Mr. Barton could not be deprived of his property right in filing suit against the District without compensation. Since the District of Columbia has provided no adequate provision for obtaining compensation, then the property owner has a claim against the Government for a "taking" in violation of the Fifth Amendment. *Williamson County Regional Planning Com'n.*, 473 U.S. at 194-195; *See Monongahela Naviation Co. v. United States*, 148 U.S. 312, 327 (1893) (amount of just compensation to be paid is a judicial question and Congress may not impose a limitation on the measure of compensation); *United States v. Miller*, 317 U.S. 369, 374 (1943) ("just compensation is "fair market value").

Since the District of Columbia Court of Appeals' decision would deprive Mr. Barton of his property rights without compensation, the lower courts' analysis violates

the "takings" clause of the Constitution by depriving Mr. Barton of compensation for deprivation of his property rights, *i.e.*, his cause of action against the District of Columbia. *First English Evangelical Lutheran Church, supra*, 482 U.S. at 315.

CONCLUSION

The Petition for Writ of *Certiorari* should be granted to resolve these issues of national importance. In the absence of review, conditions placed on the ability of the District of Columbia and the states to spend federal funds would effectively be rendered unenforceable.

Respectfully submitted,

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(Any footnotes trail the end of each document)

No. 00-CV-869

DISTRICT OF COLUMBIA COURT OF APPEALS

C. PEYTON BARTON, JR.,
APPELLANT

v.

DISTRICT OF COLUMBIA,
APPELLEE

June 5, 2002, Argued
March 6, 2003, Decided

COUNSEL: C. Michael Tarone, with whom John F. Karl, Jr., Washington, D.C. was on the brief, for appellant.

Edward E. Schwab, Assistant Corporation Counsel, with whom Robert R. Rigsby, Corporation Counsel at the time the brief was filed, and Charles L. Reischel, Deputy Corporation Counsel, were on the brief, for appellee.

JUDGES: Before TERRY, STEADMAN, and GLICKMAN, Associate Judges.

OPINION: TERRY, Associate Judge:

Appellant Barton appeals from an order granting summary judgment to the District of Columbia in an eviction proceeding. Barton owns and operates Maine Avenue Seafood, Inc., in a building owned by the federal government and managed by the District of Columbia. In November of 1999, the District of Columbia sued Barton

for possession in landlord-tenant court when he failed to vacate the premises after the District canceled his month-to-month lease. Barton claims that the trial court erred in not recognizing that the District of Columbia Appropriation Act for Fiscal Year 1999 contained language which entitled him to a new thirty-year lease.

He further contends that the trial court's decision violated his rights to due process and equal protection of the laws. We hold that Barton is not entitled to a thirty-year lease, but we also hold that the trial court erred when it failed to consider his due process and equal protection claims. Accordingly, we remand the case for further proceedings.

I

The Southwest Waterfront in the District of Columbia, along Maine Avenue between 11th and 12th Streets, is the home of the municipal fish wharf and market. *See* D.C. Code § 37-205.01 (2001) (formerly D.C. Code § 10-137 (1998)). The land is owned by the federal government, but the Mayor of the District of Columbia is authorized to "control, regulate, and operate" it. *Id.* Using that power, the Mayor has entered into leases with several businesses allowing them to operate from barges moored along the pier and two buildings located on the wharf.

In 1998 the federal government noted that the fish wharf and the neighboring marina had fallen into a dilapidated condition. Congress found that the failure of the District to renew long-term leases with the businesses located there made it difficult for them to obtain financing for maintenance and improvement of the property and was a contributing factor to the poor condition of the area. *See*

H.R. REP. No. 105-670, 105th Cong., 2d Sess., at 22-23 (1998). To improve the waterfront, Congress appropriated $ 3 million in fiscal year 1999 to the District of Columbia Department of Housing and Community Development ("DHCD") to conduct "a study in consultation with the United States Army Corps of Engineers of necessary improvements to the Southwest Waterfront in the District of Columbia . . . and for carrying out the improvements recommended by the study." District of Columbia Appropriations Act, 1999, Pub.L. No. 105-277, 112 Stat. 2681--124-125 (1998) (the "1999 Appropriation Act"). The appropriation, however, contained the following restriction:

> *Provided*, That no portion of such funds shall be available to the District of Columbia unless the District of Columbia executes a 30-year lease with the existing lessees, or with their successors in interest, of such portions of property not later than 30 days after the existing lessees or their successors in interest have submitted to the District of Columbia acceptable plans for improvements and private financing . . . . *Id.* at 125.

About a year later, Congress amended this proviso in its 2000 appropriation for the District by changing "existing lessees" to "existing lessees of the Marina." District of Columbia Appropriation Act, 2000, Pub.L. No. 106-113, § 164 (b)(1), 113 Stat. 1529 (1999) (the "2000 Appropriation Act"). The amendment was to "take effect as if included in" the 1999 Appropriation Act. *Id.* § 164 (b)(2).

Appellant Barton owns and operates Maine Avenue Seafood, Inc., in a building on the waterfront known as the fish market building. Pursuant to the proviso in the 1999 Appropriation Act, the District began negotiating with Barton in December 1998 to replace his month-to-month lease with a thirty-year lease. Negotiations over the lease and improvements to the fish market building continued for several months. Meanwhile, in July 1999, the DHCD and the Army Corps of Engineers completed their study of the area and concluded that the fish market building was in poor condition and was "also poorly located on the site and interrupts traffic patterns." The study reviewed four proposed action plans, one of which included demolishing the building and replacing it with a new one. In discussing the replacement proposal, the study noted that "[w]ithout a Master Plan, replacement in kind is assumed . . . ." FN1

After the release of the study, negotiations between Barton and the District began to focus on leasing space on one of the barges moored along the dock. FN2 Barton was willing to move his business to one of the barges, but he balked when he discovered that the barges the District intended to lease to him were currently being leased by other fish wharf tenants. Believing that entering into such a lease would result in litigation with those tenants, Barton refused to lease any space on a barge. Both Barton and the District accused each other of negotiating in bad faith.

In September of 1999, according to Barton's affidavit, FN3 Carl Johnson, an employee of the District of Columbia authorized to deal with the leases, came to his office and told him, "White trash, you are out of here." Two weeks later, the District gave Barton notice to quit

the building because "the current use of the property is inconsistent with improvement plans for the premises." When Barton did not move out, the District brought an action for possession in the Landlord and Tenant Branch of the Superior Court.

In his answer to the complaint, Barton asserted that the 1999 Appropriation Act gave him a statutory entitlement to a lease, that the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* (1994), precluded the District from evicting him before the filing of an environmental impact statement, and that the eviction proceeding was motivated by racial animus as reflected in Mr. Johnson's "white trash" remark, in violation of his constitutional rights to due process and equal protection. The District moved for summary judgment, arguing that Barton's defenses were beyond the scope of those allowed by the Landlord and Tenant Rules. FN4 Barton opposed the summary judgment motion and filed his own action against the District in the United States District Court for the District of Columbia. FN5 Barton also moved in the Superior Court to stay the landlord-tenant case in light of his related complaint in federal court. That motion was apparently denied. FN6 The Superior Court, in any event, proceeded with the case and granted the District's motion for summary judgment. Putting aside the issue of whether Barton's statutory entitlement claim was precluded by the rules, the court rejected it on the merits, holding that "there is no indication that Congress intended the statute to provide persons in [Barton's] predicament any enforceable rights whatsoever, such as a defense to a possessory action." The court also rejected Barton's defense based on NEPA FN7 and held that his racial discrimination claim was barred by the limited scope of the Landlord and Tenant rules.

Barton then filed a motion to stay execution of the judgment pending the outcome of his federal court case. He later noted the instant appeal and amended his motion, asking that execution be stayed pending the outcome of the appeal. The trial court granted the amended motion, on condition that Barton pay into the registry of the court a sum equal to his monthly rent.

Mr. Barton raises several arguments on appeal. His main contention is that the trial court erred in ruling that the 1999 Appropriation Act did not grant him a right to a thirty-year lease. Additionally, he claims that the court erred in granting summary judgment against him because the District failed to present evidence that the Army Corps of Engineers had recommended demolishing his building without replacement or that the federal government had approved demolition of the building before the District issued its eviction notice. Finally, he argues that the judgment violated his due process and equal protection rights.

II

Mr. Barton's principal claim is that he is entitled to a thirty-year lease under the 1999 Appropriation Act. Although that Act expressed a desire for the District to enter into long-term leases with existing fish market lessees, we agree with the trial court that it does not grant the lessees any rights that they can enforce in a court of law.

In considering whether a statute creates a private right of action, either expressly or by implication, "what must ultimately be determined is whether Congress intended to create the private remedy asserted . . . ." *Transamerica*

Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979); *see Kelly v. Parents United for the District of Columbia Public Schools*, 641 A.2d 159, 163-164 (D.C. 1994). Contrary to Barton's assertions, neither the language nor the legislative history of the 1999 Appropriation Act gives any indication that Congress intended to create a private right of enforcement for the lessees. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 568-574, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979) (determining whether Congress intended to grant a private right of action by analyzing statutory language and legislative history). To the contrary, Congress' stated intent was to improve the fish market and marina area by enabling lessees to obtain financing to maintain or improve their property; making long-term leases available was merely a means to that end.

Furthermore, the plain language of the 1999 Appropriation Act shows that no enforceable rights are being bestowed on the existing lessees. The statute imposes no affirmative duty on the District to execute any leases; rather, it makes the availability of appropriated funds contingent upon such action, which the District is free to take or not as it sees fit. No rights are created in third parties by such a provision. In the 2000 Appropriation Act, Congress retroactively amended the 1999 Appropriation Act by changing the term "existing lessees" to "existing lessees of the Marina." *See* 113 Stat. at 1529. The effect of this amendment was to remove the condition that the District negotiate long-term leases with those businesses operating in the fish market building. Because Barton leases space in the fish market building and not in the marina, the 2000 Appropriation Act repealed the only provision even arguably applicable to him.

III

Barton next contends that it was inappropriate for the trial court to grant summary judgment because the District did not present evidence that the federal government, as the landowner, had authorized destruction of the fish market building. The implication seems to be that the District could not evict Barton without such authority because otherwise his use of the building was not inconsistent with development of the area. Barton argues that the only authority given by the federal government for improvements was contained in the proposals of the Army Corps of Engineers, which did not recommend destruction of the building without replacement.

Whether or not the federal government ever gave the District authority to demolish the fish market building, however, is irrelevant to whether the District had the power to evict Barton. Congress had previously given the District, specifically through the Mayor, authority to "control, regulate, and operate" the entire fish wharf. D.C. Code § 37-205.01. Such a grant of authority necessarily includes the power to terminate leases in accordance with their terms. Consequently, there was no need for the District to present evidence that it had authority from the federal government to demolish the building before it evicted Mr. Barton's business. FN8

IV

Finally, Barton maintains that the trial court abridged his constitutional rights in rejecting his claim of racial discrimination. He makes two arguments. First, he contends that the trial court should have stayed the

instant landlord-tenant case pending the resolution of his related case in federal court, which included similar due process and equal protection claims. We hold that the court did not abuse its discretion in not entering a stay. There is no legal barrier to the presentation of a claim simultaneously in more than one court, in parallel lawsuits. While a stay of one proceeding in favor of another may be appropriate in a particular case, on a proper showing, Barton has made no showing whatever of any reason why the present eviction proceeding should await the outcome of the related but different case filed in federal court.

Second, at oral argument Barton asserted that the trial court erred in ruling that his discrimination claim was precluded by the Landlord and Tenant Rules. The District argues that Barton abandoned this contention on appeal because he never raised it in his brief. We note, however, in examining Barton's brief, that the trial court's failure to recognize his due process and equal protection claims is listed in the index as one of his eight arguments, is repeated in his "Statement of Issues Presented for Review," is discussed -- albeit very briefly, and without any citation of case law -- in a section at the end of his brief headed "Constitutional Deprivation," and finally is repeated in his "Conclusion." We find this treatment adequate (perhaps barely) to preserve his due process and equal protection claims for appellate review.

Having concluded that the constitutional issues are properly before us, we hold that the trial court erred in ruling that the discrimination claim was barred by the Landlord and Tenant Rules of the Superior Court. Landlord and Tenant Rule 5 (b) allows a defendant to "assert an equitable defense of recoupment or set-off or a

counterclaim for a money judgment based on the payment of rent or expenditures claimed as credits," but it also states that "[n]o other counterclaims . . . may be filed in this Branch." The trial judge considered Barton's racial discrimination claim to be a counterclaim and thus barred by Rule 5 (b). The record reveals, however, that Barton's claim was presented as a defense, rather than a counterclaim, in both his answer to the District's complaint and his opposition to the motion for summary judgment. "Notwithstanding Rule 5 (b), a defendant always has the right to present any *legal* defense as part of a general denial of liability." *Shin v. Portals Confederation Corp.*, 728 A.2d 615, 618-619 (D.C. 1999) (emphasis in original; citation omitted). Furthermore, if a defendant fails to assert a legal defense in the Landlord and Tenant Branch, he may be prohibited from raising it later in another proceeding under the doctrine of *res judicata. Id.* at 619. Thus Barton was not only permitted but required to raise his racial discrimination claim in the eviction proceeding, and the trial court erred in failing to consider it on the merits.

V

The case is remanded to the trial court for consideration of Barton's claim that the District's efforts to evict him were motivated by racial animus. In all other respects the decision of the trial court is affirmed. *Affirmed in part, remanded in part.*

FOOTNOTES

n1 The study recommended the preparation of a Master Plan for the entire Southwest Waterfront that "will address the purpose and need for the project and will

provide a 'big picture' view of what needs to be accomplished for the project to come to fruition."

n2 Although Barton was willing to move his business from the fish market building to a barge in the summer of 1999, he states in his brief (without any citation to the record) that the study, with its recommendations for development of the waterfront, "was not made available to [him] until October 1999."

n3 This affidavit was filed in the trial court in support of Barton's opposition to the District's motion for summary judgment.

n4 Superior Court L & T Rule 5 limits a defendant's pleadings to "an equitable defense of recoupment or set-off, certain counterclaims for a money judgment, and a plea of title." *Barnes v. Scheve*, 633 A.2d 62, 65 (D.C. 1993) (footnote omitted).

n5 In his federal complaint, Barton alleged, among other things, that the eviction was motivated by racial animus and that the 1999 Appropriation Act entitled him to a thirty-year lease. In January of 2001 he filed a motion for a preliminary injunction in the United States District Court, seeking to prevent the District from entering into leases with the other fish wharf tenants. *See Barton v. District of Columbia*, 131 F. Supp. 2d 236, 237-238 (D.D.C. 2001). The court denied the injunction, noting that there was no evidence that the District negotiated with Barton in bad faith and no evidence that Johnson was acting "under color of" state law when he made the alleged racial comment. *Id.* at 246. To the best of our knowledge, the underlying claim is still pending in federal court.

n6 The record before us contains no indication that the trial court ruled on the motion for stay, nor is there any order either granting or denying the motion.

n7 As to the NEPA defense, the court ruled that Barton's eviction was not a federal action ("Mr. Barton proffers no support for the notion that the actions taken by the District fall within the scope of . . . NEPA"), and, in any event, that Barton did not have standing "to raise a violation of the statute, should there be one."

n8 Furthermore, although Mr. Barton has not pressed the issue on appeal, we are satisfied that the trial court did not err in concluding that NEPA did not provide Barton with a defense to the eviction. Barton's eviction was not a federal action, and it had no impact on the environment.

Civil Action No. 99lt51941
Calendar 8

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA
Plaintiff,

vs.

PEYTON BARTON, d/b/a MAINE AVENUE SEAFOOD, Inc.
Defendant,

Hon. Rafael Diaz

ORDER

This matter is before the Court upon plaintiff's Motion for Summary Judgment and/or in the Alternative to Strike Def'endant's Counterclaim and Defenses, and defendant's Opposition thereto. On November 23, 1999, plaintiff, the District of Columbia, filed the above captioned suit in the Landlord & Tenant Branch of the D.C. Superior Court, seeking possession of the premises located at 1100 Maine Avenue, S.W.. On December 15, 1999, defendant answered, counter-claimed, and filed a jury demand, and the matter was certified to the civil division for trial. Subsequently, plaintiff filed the instant motion, asserting that no dispute exists over the material facts, and that the government is entitled to judgment of possession as a matter of law. Defendant opposes such request, proffering numerous defenses to the suit for possession.

Based on the pleadings submitted and the entire record herein, the Count rules as set forth below.

I.

Summary judgment is a remedy which is appropriate only when there are no material facts at issue and when it is clear that the moving party is entitled to judgment as a matter of law. *Willis v. Cheek*, 387 A.2d 716, 719 (D.C. 1978). " A party moving for summary judgment has the burden of proving that there is no issue of material fact." Id. The facts, when viewed in the light most favorable to the opposing party, must satisfy the court that "there is no issue of fact from which a jury could find for the non-moving party." *Nader v. de Toledano*, 408 A.2d 31, 42 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980)(quoting *Time Inc. v. McLaney*, 406 F.2d 565, 567 (5th Cir.), *cert, denied*, 395 U.S. 922 (1969)). "The movant may discharge his burden of proof by demonstrating that if the case proceeded to trial his opponent could produce no competent evidence to support a contrary position," Id at 48.

Once the movant meets this burden, "the burden shifts to the non-moving party to show the existence of an issue of material fact." *Ferguson v. District of Columbia*, 629 A.2d 15, 19 (D.C. 1993); *Smith v. WMATA*, 631 A.2d 387, 390 (D.C. 1993). Plaintiff "must set forth specific facts showing that there is a genuine issue for trial, and must demonstrate that a judge or jury is necessary to resolve the disputed fact." *Smith*, 631 A.2d at 390 (quoting Super. Ct. Civ. R. 56(e)).

II.

The undisputed facts relevant to plaintiff's motion for summary judgment are stated immediately below.[1] Defendant, Mr. Peyton Barton, leases several pieces of property at the Municipal Fish Wharf on which he runs his business, known as Maine Avenue Seafood, Inc.. The property leased by Mr. Barton is owned by the Federal Government, but managed by the District of Columbia. Defendant began his tenancy in 1996, upon acquiring the lease from Mr. Maurice Morgan who previously owned and operated Morgan Seafood at the location. The District of Columbia recognized the assignment of the lease from Mr. Morgan to defendant. Since the assignment of the lease, defendant's tenancy at the premises has been month-to-month, with rental payments due the first day of each month. On September 17, 1999, the District served upon defendant a Notice to Vacate which informed Mr. Barton that his tenancy was being terminated and that he must vacate the premises on or before November 1, 1999. The proffered reason for such termination was that the District desired to use the property in a manner other than its current use.[2] Upon the expiration of the notice to quit, defendant refused to vacate the premises, and the instant suit followed.[3]

Defendant disputes the District's contention that it is entitled to judgment as a matter of law, and raises several defenses to the action. One such defense is that, pursuant to D.C. Code § 5-825,[4] as well as several Federal appropriations bills, the District was obliged to renegotiate a long-term lease with him, and, having failed to do so, the government's notice to vacate is contrary to law. Moreover, defendant contends that the District's eviction is procedurally defective in that the government

has failed to comply with 42 U.S.C. § 4321 by neglecting to complete an environmental impact study prior to the initiation of the instant possessory action. In addition, Mr. Barton claims that the District's decision to evict is premised upon racially discriminatory animus, thereby infringing upon his constitutionally protected rights. Finally, defendant seeks damages for breach of contract and detrimental reliance to recover sums expended on improving the premises. Defendant's contention shall be discussed below.

III.

Defendant Barton concedes that he was served with a timely notice to vacate, but disputes the validity of the notice, contending that he is a "statutory tenant." Mr. Barton argues, in light of D. C. Code § 5-825, as well certain provision of federal appropriation statutes enacted in 1998 and 1999, that he was accorded preferential rights to re-lease the premises he occupies at the wharf. Particularly, defendant asserts that the District was compelled to negotiate a new lease with him, and that the municipality's failure to fulfill its obligation constitutes a defense to the instant action for possession. Upon review of the statutes cited by defendant, however, it is evident that Mr. Barton is afforded no special protection that would prevent the District from proceeding to judgment in this matter.

D.C. Code § 5-822 provides for the "rights, title, and interest" in certain lands to be transferred from the United States Government to the District of Columbia Redevelopment Land Agency (hereinafter, "the Agency"),[5] and D.C. Code § 5-825 authorizes the Agency

to lease such property. D.C. Code § 5-825(b) further provides:

In connection with the leasing of the real property transferred to the Agency . . . the Agency is authorized and directed to provide to the owner . . . of any business concern displaced from the area . . . a priority opportunity to lease . . . so much of such real property lying channelward of the southerly or westerly line of Maine Avenue as so relocated . . . may be required for the construction of commercial facilities at least substantially equal to the facilities from which such business concern was so displaced.

The language of § 5-825, according to defendant, requires the District to renegotiate a new long-term lease of the premises at issue. The Court disagrees.

According to the District, the land described in D. C. Code § 5-822 does not include the property where defendant's leased premises are located. The description of the property set forth by § 5-822 is ambiguous, at best, to one not intimately familiar with the territory referred to. See supra, fn. 4. The Court, however, need not determine whether the land upon which Municipal Wharf rests comes within the scope of § 5-822; even assuming the property was covered by such Code provision, it is clear the statute would afford defendant no remedy.

The express language of § 5-825(b) provides a priority of opportunity to lease to *displaced businesses*. The government argues that a business fails to qualify under such provision until (1) the business has been displaced; (2) the District redevelops the land; and, (3) the newly redeveloped property becomes available for leasing.

Pursuant to such reading of the provision, it is clear that defendant does not qualify for any benefit, until, at the very earliest, his business is displaced due to the government's efforts at redevelopment. Under such interpretation of the statute which this Court finds reasonable, § 5-825 does not afford Mr. Barton protection from eviction.

Whether the provisions of the Omnibus Consolidated and Emergency Appropriations Act, 1999, Pub. L. No. 105-277, obligate the District to negotiate and execute a new thirty (30) year lease with defendant, and whether the government's failure to do so bars defendant's eviction, is anther of Mr. Barton's contentions. This Act mandates that $3,000,000 be provided by the Federal Government to the District of Columbia Department of Housing and Community Development for a study regarding the improvements to the Southwest Waterfront. The provision conditions the receipt of such funds upon the District negotiating long-term leases with current lessees, stating:

> no portion of such funds shall be available to the District of Columbia unless the District of Columbia executes a 30-year lease with existing lessees, or their successors in interest, of such portions of property not later than 30 days after the existing lessees . . . have submitted to the District of Columbia acceptable plans for improvements and private financing.

Defendant's contention, once again, is unavailing.

While the above noted appropriations statute indeed conditions the payment of funds to the District upon the execution of 30-year leases with existing lessees, the District argues, the provision does not act to curtail the District's authority to issue a Notice to Quit to Mr. Barton. Indeed, after reviewing the appropriations bill, there is no indication that Congress intended the statute to provide persons in defendant's predicament any enforceable rights whatsoever, such as a defense to a possessory, action. *See Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975)(setting forth the factors to consider in determining whether a private cause of action may be implied from a statute as: (1) whether the plaintiff is a member of the class for whose especial benefit the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, to create or deny a remedy; (3) whether it would be consistent with the underlying purposes of the legislative scheme to imply a remedy; and (4) whether the cause of action is one traditionally relegated to state law in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on a federal law). To the contrary, the Court agrees with the District's position that the appropriation bill merely set a condition for the payment of federal funds, and that "the District retains its authority to evict the defendant even if such action may jeopardize the federal payment." Accordingly, the Court finds that the District and Federal statutory provisions cited by defendant fail to provide a defense to the instant possessory action.[6]

IV.

42 U.S.C. § 4321, et seq., commonly known as the National Environmental Protection Act (hereinafter, "NEPA"), mandates in relevant part that:

[a]ll agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action. Id. at § 4332.

The government's alleged failure to fulfill the obligation imposed by the Act are invoked by Mr. Barton as a defense to the District's instant possessory proceeding. More specifically, he contends that the District's plan to evict him are in violation of 42 U.S.C § 4332, in that no Environmental Impact Study has been prepared regarding the effects of such action on the environment. Authority in support of such contention is not provided by defendant. Specifically, Mr. Barton proffers no support for the notion that the actions taken by the District fall within the scope of the NEPA. Moreover, defendant offers no legal support for the theory that he has standing to raise a violation of the statute, should there be one. In this regard, defendant's contentions are without merit. The Impact Statement required by the NEPA is intended to provide a basis for evaluating the benefits and possible detriments of proposed legislation and/or Federal actions vis-à-vis the environment. *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *see also Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976 (9th Cir. 1985)(noting that the purpose of NEPA

is to assure that federal agencies are fully aware of the impact of their decision on the environment). In accordance with the plain language of the Act, the Impact Statement requirement is only implicated prior to "major Federal action significantly affecting the quality of the human environment." Defendant fails to satisfy such threshold requirement.

Firstly, upon considering the facts laid forth by defendant, it is difficult to conceive of Mr. Barton's eviction as an "action significantly affecting the quality of the human environment."[7] Moreover, it is difficult to decipher the necessary *Federal* involvement in this matter. It is the District government, through its Redevelopment Land Agency, which is attempting to retake possession of Mr. Barton's premises and redevelop the waterfront area, not the Federal government. While defendant argues that the district is acting in an attempt to secure a three million-dollar federal grant, such is insufficient to rise to the level of "federal action" within the meaning of NEPA.

A review of the record reveals that the only involvement of the Federal government in the instant dispute was its appropriating several million dollars to the District's Department of Housing and Community Development "for a study . . . of necessary improvements to the Southwest Waterfront." The Federal government has not dictated how the property identified was to be developed by the District. Matters within the discretion of the D.C. government constitute local action, and fall outside the scope of NEPA. *See Metro Washington Coalition for Clean Air v. Department of Economic Development*, 373 F. Supp. 1096 (D.C.D.C 1973)(holding that decision to close an alley is local, and not Federal action as required

under NEPA, and noting that the act does not apply to mere recommendations made by the U.S. government to local authorities). Moreover, the mere creation of a plan for urban redevelopment, created with federal funds, does not convert the project into a major federal action within the meaning of the Act. *Bradley v. United Sates Department of Housing and Urban Development*, 658 F.2d 290 (5th Cir. 1981). Accordingly, the dispute surrounding Mr. Barton's leased property has arisen absent the requisite "major federal action" to bring this matter within the scope of NEPA so as to require an impact study.

Even assuming defendant alleged sufficient federal action affecting the human environment to warrant an impact study, it is clear that Mr. Barton lacks standing to raise such an issue. An individual alleging a NEPA claim "must assert an interest arguably within the zone of interests to be protected or regulated by" the Act. *Western Radio Services Co., Inc. v. Espy*, 79 F.3d 896 (9th Cir. 1996); *see also Wyoming Farm Bureau Federation v. Babbitt*, 987 F. Supp. 1349 (D. Wyo. 1997); *Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921(E.D.N.C. 1995).

Moreover, "NEPA's purpose is to protect the environment, not the economic interests of those adversely affected by agency decisions." *Id.* at 903. Individuals asserting purely economic injuries therefore lack standing to challenge government actions pursuant to NEPA. *Id*; *Nevada Land Ass'n v. U.S. Forrest Service*, 8 F.3d 713 (9thCir. 1993); *Trawler Diane Marie, Inc.*, 918 F. Supp. at 931 . Mr. Barton, in the instant case, fails to allege any concern for the environment, but rather is understandably connected with the continued status of his business enterprise and his related financial

wellbeing. Such concerns, however, are not meant to be protected by NEPA. *See Clinton Community Hospital Corp. v. Southern Maryland Medical Center*, 510 F.2d 1037 (4th Cir. 1975)(holding that one's economic well-being vis-à-vis its commercial competitors is not arguably within the zone of interests to be protected by Federal environmental laws). Defendant's "NEPA defense" to the District's possessory action must also fail.

Mr. Barton further defends the instant action by alleging that the District's decision to evict him is in violation of his right to contract pursuant to 42 U.S.C. §§ 1981, 1982, and 1983 in that the District's decision was motivated by racially discriminatory animus. Additionally, defendant counterclaims, alleging breach of contract and/or detrimental reliance in effort to recover expenditures made in expectation of defendant's continued leasehold. In light of the procedural rules governing landlord and tenant court, both claims must fail.

The factual predicate for defendant's assertion of discrimination is discussed immediately below. Throughout the Spring and Summer of 1999, Mr. Barton contends he was involved in negotiating a long-term lease of his premises at the Municipal Fish Wharf with Messrs, Jones and Johnson, both of whom were employed by the District government.[8] Pursuant to such negotiations, drafts of leases as well as proposals for the construction of a new fish market building were sent between the parties, and Mr. Barton was in continuing communication with Jones and Johnson regarding his lease extension. Additionally, Mr. Barton alleged having expended monies in improving the building.

At some point during the negotiation process, Mr. Jones inquired of Mr. Barton whether he would be interested in operating his business from a floating barge. Defendant responded that he would be willing to conduct business from such a location. However, upon investigating the proposal, Mr. Barton learned that the current occupants of the barges were unwilling to relinquish their possession of such sites. Mr. Barton concluded that it would therefore be unfeasible to transition his business to a floating barge, and that pursuing such a course of action would only lead to litigation with the current lessees of such location.

Mr. Barton informed the District's representatives of his determination, and soon thereafter, Mr. Barton was accused by Mr. Jones of no longer negotiating in good faith based upon defendant's refusal to consider the option of relocating to a barge. Mr. Jones subsequently terminated negotiations with defendant.[9] Finally, on or about September 3, 1999, Mr. Johnson appeared at defendant's premises, and proceeded to berate him, stating, "White trash, you are out of here!" Two weeks later, defendant was served with a Notice to Vacate.

The District contends that the discrimination and breach of contract claims are outside the scope of the permissible defenses and counterclaims which may be raised in landlord and tenant court. Super. Ct. L&T R. 5 denotes the permissible defenses and counterclaims which may be raised in this forum. The Rule provides:

> [i]n actions in this Branch for recovery of possession of property *in which the basis of recovery is nonpayment of rent* . . . the defendant may assert an equitable defense

> of recoupment or set-off or a counterclaim for a money judgment based on the payment of rent or on expenditures claimed as credits against rent or for equitable relief related to the premises. *No other counterclaims, whether based on personal injury or otherwise, may be filed in this Branch* (emphasis added).[10]

The limited jurisdiction of the Civil Division to entertain counterclaims and defenses asserted in landlord and tenant claims certified to the Civil Division upon a proper jury demand was reiterated by the Court of Appeals in *Barnes v. Scheve*, 633 A.2d 62 (D.C. 1993)(finding that the trial court lacked jurisdiction to impose lien against property under D. C. Code § 47-1308 for the amount paid for tax deed invalidated by court). Pursuant to such limitations, it is evident that Mr. Barton's contention regarding alleged discrimination on the part of District officials, as well his claims for breach of contract,[11] may not be properly asserted through the instant case. Such claims must therefore be dismissed *without prejudice* to being filed in anther, more appropriate, branch of this Court. See Super. Ct. L&T R. 5(b); *Mathis v. Barrett*, 544 A.2d 287 (D.C. 1988)(holding that a trial court does not abuse its discretion in dismissing without prejudice counterclaims improperly filed in violation of Rule 5(b)).

Accordingly, it is this 12th day of April, 2000, hereby

ORDERED, that the District of Columbia's Motion for Summary Judgment for Possession is GRANTED; and it is

FURTHER ORDERED, that defendant's counterclaim is DISMISSED without prejudice to being refiled in an appropriate forum.

Hon. Rafael Diaz
Judge, D.C. Superior Court

(Signed in Chambers)

FOOTNOTES

[1] The Court notes that the factual background provided by defendant in support of his Opposition to the instant motion is far more extensive than the statement of facts recounted herein. However, while defendant suggests numerous factual disputes exist, a careful review of the record reveals that any alleged disputes are immaterial to the Court's analysis.

[2] Defendant in fact contests this explanation for the termination of his tenancy, noting that initially, Mr. Jones, a representative of the Mayor's office, informed defendant that he was to be evicted for his refusal to renegotiate in good faith a new long-term lease.

[3] The Court shall interpose additional facts where warranted throughout the legal analysis to follow.

[4] For a description of said provision, see infra, pages 4-5.

[5] The Code describes such land as follows: "[T]he area bounded by the east line of 14th Street Southwest, the existing southerly (or westerly) building line of Maine Avenue Southwest, the northerly line of Fort Lesley J. McNair at P Street Southwest, and the bulkhead line established pursuant to the Rivers and Harbors Act of

1899 (30 Stat. 1151), as amended, together with any land area extending channelward from said bulkhead line."

[6] The Court has chosen above to analyze the merits of defendant's proffered defenses. Having determined that said defenses fail, on their merits, in preventing Mr. Barton's eviction, the Court need not determine the issue of whether Super. Ct. L&T R. 5, and the summary nature of landlord and tenant proceedings, should otherwise inhibit defendant from *even raising* such issues.

[7] Defendant, through the instant Opposition, characterizes the action to be taken not only as his eviction, but also, the subsequent imminent demolition of the fish market building. While the destruction of said structure may constitute an action within the meaning of NEPA, the issue before this court is limited to Mr. Barton's eviction, and not what may come of his premises once the District recovers possession.

[8] According to defendant, Mr. Johnson holds the position of Chief Division of Administrative Services for the D.C. Department of Housing and Community Development. Mr. Jones is an employee of the U.S. General Services Administration who has been assigned to the Mayor's Office, Downtown Business Improvement District, Mr. Jones has been authorized by the Mayor to negotiate leases with the existing lessees of the Municipal Fish Wharf.

[9] Mr. Barton contends that Mr. Jones' proposal regarding the floating barge was designed to elicit objection from defendant so that the District would then have reason to stop negotiations regarding his lease.

[10] Rule 5(c) also provides for a defendant to assert a Plea of Title.

[11] The Court acknowledges that, pursuant to Super. Ct. L&T R. 5, had this been an action based upon nonpayment of rent, Mr. Barton's contract claim would likely be properly before the Court. Such, however, is not the case.

No. 00-CV-869
LT51941-99

DISTRICT OF COLUMBIA COURT OF APPEALS

C. PEYTONBARTON, JR.,
Appellant,

v.

DISTRICT OF COLUMBIA,
Appellee.

August 5, 2003

BEFORE: Wagner, Chief Judge; *Terry, *Steadman, Schwelb, Farrell, Ruiz, Reid, *Glickman, and **Washington, Associate Judges.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, and the opposition to petition for rehearing, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

**Associate Judge Washington has recused himself from this case.

Case No. L&T 05194 99

SUPERIOR COURT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA,
Plaintiff,

v.

PEYTON BARTON,
d/b/a Maine Avenue Seafood, Inc.,
Defendant

Cal. No. 8
Judge Diaz
Next Event: Pretrial on 2/18/00

Filed February 4, 2000

AFFIDAVIT of C. PEYTON BARTON

[Excerpts]

I, C. Peyton Barton, being duly sworn state under penalty of perjury that the following statements of fact are true and correct based upon my personal knowledge:

* * *

40. By letter dated May 12, 1999 (Exhibit F), I advised Mr. Jones of the status of the lease negotiations. Mr. Jones had taken the lead role in negotiating new leases on behalf of the District with

the lessees at the MUNICIPAL FISH WHARF. The May 12, 1999letter was sent in response to Mr. Jones's request that I submit a specific proposal with respect to constructing a new building to replace the FISH MARKET BUILDING. I proposed construction of a 4200 square foot building, consisting of 3000 square feet on the ground floor, and 1200 square feet on the second floor. In accordance with Mr. Jones' request, I also transmitted to Mr. Jones a schematic architectural drawing of the new building.

41. On June 3, 1999, the lessees, District officials, representatives of the U.S. Corps of Engineers, and Mr. Jones took part in a physical inspection of the MUNICIPAL FISH WHARF. At that time, Mr. Jones advised my representative that I was to make certain repairs and minor improvements to the parking area which I lease.

42. On June 4, 1999, 1 met face to face with Mr. Jones for the first time. On that occasion, Mr. Jones told me that the District was working on the lease, and personally approved my suggested improvements to the surface of the parking lot. At that time, Mr. Jones asked me about my possible interest in operating my business from a barge rather than land. I told Mr. Jones I certainly would be interested.

43. By letter dated June 5, 1999 (Exhibit G), I confirmed discussions he had with Mr. Jones regarding several alternatives for my business. At that time Mr. Jones suggested that I had the option of locating my business on a barge, however, the location Mr. Jones referred to was already occupied by CUSTIS AND BROWN SEAFOOD and JESSIE

TAYLOR SEAFOOD.

* * *

44. The wharf locations Mr. Jones referred to have been and continue to be leased to and occupied by the Evans Family. The Evans Family owns and operates two businesses at the wharf: (1) C. & F. Seafood, Inc. and Stan Evans Seafood, Inc., t/a "JESSIE TAYLOR SEAFOOD," and (2) Evans Brothers Seafood, Inc., t/a "CUSTIS AND BROWN SEAFOOD" (hereinafter, collectively, the "Evans Family").

45. Following his June 4, 1999 meeting with Mr. Jones, I met with members of the Evans Family to inquire about the availability of the wharf locations which they had occupied for 35 years. The Evans Family stated that they had no intention whatsoever of surrendering their locations at the wharf, and that they would take whatever legal action was necessary to protect their interests.

* * *

50. By letter dated August 10, 1999, I responded to allegations made by Mr. Jones that I had not been negotiating in good faith. I made clear that an offer of locations leased and occupied by the Evans Family was less an offer than it was an invitation for litigation. (Exhibit J) .

* * *

52. By letter dated August 27, 1999 (Exhibit L), I advised Mr. Jones that the new lease Mr. Jones promised to provide me for the FISH MARKET

BUILDING was not forthcoming. I also stated that I had made improvements to the FISH MARKET BUILDING in reliance on the District's representations that I could remain in the building.

* * *

55. In late August 1999, I told Mr. Jones that I had no objection to operating from a wharf location, but that I would like to continue my operations from the FISH MARKET BUILDING until the barge was ready.

* * *

56. By letter dated September 9, 1959 (Exhibit M), counsel for the Evans Family stated his clients' objections to Mr. Jones' offer of their wharf locations to me. Counsel made clear that the District's legal position was ill advised and that the Evans Family would seek judicial relief to protect their interests.

* * *

63. In late May and in June 1999, I obtained building permits from the District for improvements I understood the District wanted me to make. I expended approximately $50,000 for the improvements. Mr. Johnson approved the improvements and I carried out the work with Mr. Johnson's full knowledge. By letters dated May 24 and 26, 1999, I advised Mr. Johnson of the action I was going to take to bring the property up to standard. See Exhibit P.

* * *

I, C. Peyton Barton. hereby swear under penalty of perjury that the above statement are true and correct to my best knowledge.

C. Peyton Barton, Jr.

Notarization

C. Peyton Barton, Jr. appeared before me this day of February 2000.
Jean C. Ramos-Izquerdo
NOTARY PUBLIC OF THE STATE OF MARYLAND